No. 14-915

IN THE

Supreme Court of the United States

REBECCA FRIEDRICHS, SCOTT WILFORD, JELENA FIGUEROA, GEORGE W. WHITE, JR., KEVIN ROUGHTON, PEGGY SEARCY, JOSE MANSO, HARLAN ELRICH, KAREN CUEN, IRENE ZAVALA, AND CHRISTIAN EDUCATORS ASSOCIATION INTERNATIONAL, PETITIONERS

v.

CALIFORNIA TEACHERS ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

May government officials avoid the protections of the First Amendment by engaging in coercion laundering?

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INTEREST OF THE *AMICUS* AND SUMMARY OF THE ARGUMENT[1]

The Becket Fund for Religious Liberty is a non-profit law firm dedicated to the free expression of all religious traditions. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world.

The Becket Fund is concerned that if governments like California are permitted to mask the coercive effect of their actions on religious objectors merely by interposing non-governmental intermediaries, then many of the protections of the First Amendment will be neutered.

ARGUMENT

This brief makes one simple point: a system of government coercion that violates the First Amendment cannot be sanitized by interposing other entities between the government doing the coercing and the private citizen being coerced. When a person uses third parties as intermediaries to mask the source of illicit funds, we call it money laundering. When government uses third parties as intermediaries to mask the source of the coercion, we can call it coercion laundering.

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[1] No counsel for a party authored any portion of this brief or made any monetary contribution intended to fund the preparation or submission of the brief. Consents to the filing of this brief are on file with the Clerk.

And California has done exactly that. California's coercive agency shop rule requires Petitioners to pay funds to a union rather than the government. And California's religious accommodation scheme requires employees who religiously object to supporting a union to pay funds instead to one of three (non-religious) union-approved charities. In both situations there are a couple of non-governmental intermediaries—the union and the union's chosen non-religious charities—between the government and the Petitioners. But ultimately it is the government that is forcing a private citizen who doesn't ascribe to a particular point of view to pay money to promote that point of view. If there is to be an opt-out for religious objectors, it ought to be a true opt-out, not a fake one.

I. Government attempts to mask coercion using third parties are common.

As we use it here, "launder[ing]" is an action that "disguise[s] the source or nature of (illegal funds, for example) by channeling through an intermediate agent." *Cuellar* v. *United States*, 553 U.S. 550, 558 (2008) (quoting American Heritage Dictionary 992 (4th ed. 2000)). In a typical money laundering case, the law looks past the legitimate business that received the money to the criminal seeking to disguise his ill-gotten gain. See 18 U.S.C. 1956. The same concept applies under federal laws prohibiting straw purchases of firearms. See 18 U.S.C. 922(a)(6); 18 U.S.C. 924(a)(1)(A). Federal law prohibits felons from purchasing firearms; straw purchaser statutes forbid selling guns to a middleman who intends to deliver them to, *inter alia*, a felon. See generally *Abramski* v. *United States*, 134 S. Ct. 2259, 2265 (2014).

Although "laundering" is most often used in the context of criminal activity, the idea applies just as well to situations where government officials want to hide government coercion by interposing third-party intermediaries. Unfortunately, coercion laundering has become a common method of evading constitutional and civil rights restrictions on government activities.

In the typical case, the government requires a private citizen to interact in a specified way with a private third party. At the same time the government claims that the coercion is more attenuated because there is a third party in between the government and the citizen. By interposing a third party, the government thus proposes to wash its hands of the coercion.

This Court has long rejected coercion laundering in criminal procedure. So, for example, the government cannot avoid rules against entrapment by having a private citizen do the inducing: courts will look beyond the actions of the citizen to the federal agent who stands behind him. See, *e.g.*, *Mathews* v. *United States*, 485 U.S. 58, 60 (1988) (valid entrapment defense raised by a government official who was allegedly bribed by a friend cooperating with the FBI). *Sherman* v. *United States*, 356 U.S. 369, 376 (1958) (treating a confidential informant as an agent of the government in an entrapment case).

In recent years, one example of attempted coercion laundering to come before the Court was *Agency for International Development* v. *Alliance for Open Society International, Inc.*, 133 S. Ct. 2321 (2013) ("*AOSI*"). In that case, the federal government administered a pro-

gram that funded efforts by nongovernmental organizations to combat HIV/AIDS worldwide. See *id.*, 133 S. Ct. at 2325. As a condition to receiving funding under the program, grant recipients had to adopt a "policy explicitly opposing prostitution." *Id.* at 2326. After it was sued, the government issued regulations seeking to accommodate objecting nonprofit organizations. These "affiliate guidelines" would, according to the government, allow nonprofit organizations to "decline funding themselves (thus remaining free to express their own views or remain neutral), while creating affiliates whose sole purpose is to receive and administer Leadership Act funds." *Id.* at 2331. In other words, the government believed that it could avoid the unconstitutional conditions doctrine by filtering its coercive policy through an affiliate organization.

The Court rejected the government's regulatory gambit, holding that the affiliate workaround would allow expression of the organization's "beliefs only at the price of evident hypocrisy." *Id.* at 2331. Interposing an affiliate thus did not cleanse the government's conditions of unconstitutionality, and the program was struck down.[2]

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[2] Sometimes the government's dodge takes the form of outsourcing. For example, in long-running litigation over inmates' access to kosher food, coercion laundering has taken on a strange new form: "rabbi shopping." State officials, aware that they cannot second-guess the religious beliefs of Orthodox Jewish inmates, have retained Reconstructionist rabbis as consultants. Officials have relied on these Reconstructionist rabbis, who do not share the beliefs of the Or-

In *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001), Congress set up a "Mushroom Council" to act as a third party to decide how to use monetary contributions the government compelled large mushroom growers to submit. Most of the compelled funds went to subsidize speech that the plaintiff mushroom grower disagreed with. The Court rejected the government's attempt to compel speech through a government-created third-party intermediary. The existence of the Mushroom Council could not veil that ultimately the government was responsible for the compelled speech.

II. Coercion laundering cannot save California's scheme.

California's scheme now before the Court is another instance of attempted coercion laundering and should be struck down like the programs in *AOSI* and *United Foods*.

The baseline First Amendment rule is simple: "[E]xcept perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris* v. *Quinn*, 134 S. Ct. 2618, 2644 (2014). As a result, "compulsory subsidies for private

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thodox inmates, to bless their meal plans as religiously adequate. See Declaration of Rabbi Menachem M. Katz, *Lawson* v. *Florida Dept. of Corrs.*, No. 4:04-cv-00105-MP-GRJ, Doc. 59-2 (N.D. Fla., filed April 7, 2006) (describing non-kosher nature of meal program and Florida's reliance on Reconstructionist rabbi). Thus state officials used a third party to do what they could not do themselves: second-guess the plaintiffs' religious beliefs.

speech are subject to exacting First Amendment scrutiny." *Knox* v. *Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2289 (2012).

California requires its objecting employees to support speech they do not wish to support in at least two ways. First, all public school employees "shall, as a condition of continued employment, be required either to join the recognized employee organization or pay the fair share service fee." Cal. Gov't Code § 3546(a). In order to avoid paying for the union's other political activities, these employees must affirmatively opt out. Regs. Of Cal. Pub. Emp't Relations Bd. § 32993 (2014). As Petitioners have explained, this system results in compelled political speech and must meet strict scrutiny. Pet. Br. at 16-20. That the objected-to speech is carried out by a union or that the money flows into the union's coffers should not serve to veil the government coercion.

The second pathway for compelled speech is no better. California also compels public school employees with religious objections to trade unionism—such as Seventh-day Adventists and Petitioner Zavala—to speak. Religious objectors must pay an equivalent fee to one of three union-approved "nonreligious, nonlabor" charities. Cal. Gov't Code § 3546.3; see also Pet. Br. 4-5 n.1. Religious-objector employees in Jurupa Unified School District, for example, must pay their fee to either the Foundation to Assist California Teachers, NEA-Jurupa Christa McAuliffe Memorial Scholarship Fund, or the Rubidoux Lions Club — Sight Fund. See Duchon Br. in Opp., App. 8a. The compulsion is still there, even though the government has run it through two private intermediaries.

The system in this case—like the systems in *Abood*, *Knox*, and *Harris*—results in compelled funding for the union or—in the case of religious objectors—for a predetermined set of charities. California's emphasis on the benefits of public sector unions cannot obscure the fact that the state is using its power to coerce public school employees to support speech with which some of them disagree. To allow California to avoid strict scrutiny is to permit a form of coercion laundering, where the state is able to hide behind the interests of a third party—the union—and escape responsibility for its own actions. The law rejects such schemes in the context of money laundering. The Court should do the same here.

CONCLUSION

Like many other governments, California demands, "Pay no attention to that [government] behind the curtain!" But the Court should pay attention. Whether government directly compels speech or indirectly compels it behind a veil of third parties, if the source of the coercion is government, it should be subjected to strict scrutiny. The Court should reverse the decision below and overrule *Abood*.

Respectfully submitted.

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